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Supreme Court, U.S.
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No. 99-1171

IN THE
SUPREME COURT OF THE UNITED STATES

THE GREATER NEW YORK METROPOLITAN FOOD COUNCIL, INC., THE ADVERTISING FREEDOM COALITION, and THE ADVERTISING CLUB OF NEW YORK, INC.,

Petitioners,

-v.-

RUDOLPH W. GIULIANI, in his official capacity as Mayor of the City of New York, THE CITY OF NEW YORK, GASTON SILVA, in his official capacity as Commissioner of the New York City Department of Buildings, and ALFRED C. CERULLO, III, in his official capacity as Commissioner of the New York City Department of Finance,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

LEONARD J. KOERNER*
ELIZABETH SUSAN NATRELLA
of Counsel

*Counsel of Record

MICHAEL D. HESS
Corporation Counsel of
the City of New York
Attorney for Respondents
100 Church Street
New York, NY 10007
(212) 788-1033 or 1010

March 10, 2000

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COUNTER-QUESTION PRESENTED

Are the provisions of the City of New York's Youth Protection against Tobacco Advertising and Promotion Act, which restrict the location of outdoor and publicly-visible tobacco advertisements away from areas where minor children congregate, preempted under 15 U.S.C. § 1334(b) of the Federal Cigarette Labeling and Advertising Act?

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RESPONDENTS' BRIEF IN OPPOSITION

COUNTER-STATEMENT OF THE CASE

Respondents, Mayor Rudolph W. Giuliani, *et al.* ("respondents"), respectfully request that this Court deny the petition by petitioners, the Greater New York Metropolitan Food Council, Inc., the Advertising Freedom Coalition, and the Advertising Club of New York, Inc. ("petitioners"), for a writ of certiorari to review the judgment and opinion of the United States Court of

Appeals for the Second Circuit, entered October 25, 1999 (1a-20a). The opinion is reported at 195 F.3d 100 (2d Cir. 1999).

The Second Circuit affirmed in part and reversed in part a judgment of the U.S. District Court for the Southern District of New York (Batts, J.), entered December 18, 1998 (21a-40a). The Circuit Court reversed, with one small exception, the District Court's granting summary judgment to petitioners and entering a permanent injunction against defendants from enforcing the City of New York's Local Law 3 of 1998, the Youth Protection against Tobacco Advertising and Promotion Act ("the Youth Protection Act"). The Circuit held that the District Court erred in finding that the Federal Cigarette Labeling and Advertising Act ("FCLAA"), 15 U.S.C. §1331 *et seq.*, preempted the Youth Protection Act. The Circuit Court remanded the case to the District Court for further proceedings.

This Court should deny review. There is ample agreement among a majority of Circuits, the Second, Fourth and Seventh, that local laws such as the City's are not preempted under the FCLAA. Furthermore, the present application is premature, because the single claimed conflict with the Ninth Circuit is not yet resolved given that that Court is considering rehearing the case *en banc*. In addition, there is no final judgment in the instant case which has yet to be resolved with respect to the claimed First Amendment violation. Finally, the decision is correct and in accord with this Court's precedent.

The Youth Protection Against Tobacco Advertising and Promotion Act

On December 17, 1997, the New York City Council passed the Youth Protection Act (A1405). The Act amended Title 27 of the New York City Administrative

Code ("Admin. Code"), by adding Article 17-A which is codified at § 27-508.1 *et seq.* (41a-47a).

In relevant part, the Youth Protection Act restricts outdoor tobacco product advertisements (other than those on moving vehicles) within 1000 feet of various locations where children congregate, *i.e.*, any school building, playground, child day care center, amusement arcade or youth center (44a). It also restricts such advertisements in those same areas, when such advertisements are publicly-visible from the street, *i.e.*, within five feet of any exterior window or any door which is used for entry or egress by the public to the building or structure (45a). However, such tobacco product advertisements may be placed or maintained in the interior of any such premises where such advertisements are (i) parallel to the street and face inward, or (ii) affixed to a wall panel or similar structure that is perpendicular to the street regardless of whether such advertisements are illuminated or not illuminated (45a).

Section 1 of the Act contains the Council's comprehensive "Declaration of legislative findings and intent" (A1393-97).[1] The Council finds that certain tobacco product manufacturers have admitted engaging in "strategies designed to advertise and promote tobacco products to minors" and further that "such strategies undermine state and local laws prohibiting the sale or distribution of tobacco products to minors" (A1393). The Council also finds that exposure of minors to such tobacco product advertising and promotion may be constitutionally-restricted through "reasonable targeted limitations on the advertising of such products near schools and other locations where children tend to congregate" (A1393).

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[1] Numbers in parentheses preceded by the letter "A __" refer to pages of the Joint Appendix on Appeal in the Circuit.

The Declaration includes data establishing a dramatic increase in teenage smoking, citing statistics gathered by the federal Centers for Disease Control and Prevention ("CDC") demonstrating that, although the rate of smoking among adults decreased by 50% between 1971 and 1993, the rate of smoking among all high school students increased by over 26% from 1991 to 1996 (A1393). The Council notes that this dramatic increase in teenage smoking occurred even while all the states have had prohibitions in effect on the sale or distribution of cigarettes and other tobacco products to minors and despite a voluntary industry code to prohibit tobacco advertisements that appeal to minors (A1393-94).

The Council emphasizes that studies demonstrate that "nearly 90% of all smokers begin to smoke prior to the age of 18 and that the average child smoker starts daily smoking by the age of 14" (A1394). The Council's findings also note that in New York City, as reported by the Department of Consumer Affairs, 200 children begin to smoke every day (A1393-94).

The Council reviews the City's efforts to enforce local and State laws against sales of tobacco products to children, including: N.Y.C. Admin. Code, § 17-620, which forbids the sale of tobacco products to minors and requires the showing of identification by buyers unless they reasonably appear to be at least 25-years old; N.Y. Public Health Law, § 1399-cc (essentially identical to § 17-620); and N.Y. Penal Law, § 260.21(3), which provides that selling tobacco in any form to a child under age 18 is a crime (A1393-95, A742).

In particular, the Council summarizes the results of its thorough 1995 investigative report entitled *Easy Access*, concerning the wide accessibility of cigarettes to minors in the City (A1394, A825-67). Led by the Department of Consumer Affairs, the enforcement efforts against tobacco

product retailers who violated the law by selling tobacco products to minors, included citywide sweeps, issuance of numerous violations to repeat violators, and the suspension of licenses of those retailers who illegally sold tobacco products to minors three times (*id.*). Notwithstanding, numerous stores continued to violate these laws (A1394-95).

The Council underscores the major role played by tobacco advertising and promotion in tobacco use by minors, citing various studies from the Journal of the American Medical Association ("JAMA"), reports of the National Institute of Medicine and the CDC finding that advertising and promotion "...increase tobacco use by youths...." (A1394-95). For example, a 1992 JAMA article entitled *Brand Logo Recognition by Children Aged 3 to 6 Years* "demonstrated that 30 percent of the three year olds and 91 percent of the six year olds surveyed could correctly match the Joe Camel cartoon trademark with Camel cigarettes" (A1394, A983-88). A 1991 JAMA article estimated that "illegal sales of Camel cigarettes to minors rose from $6 million per year before the advent of Joe Camel in 1988 to $476 million by the end of 1991," with 1/4 of all Camel sales in 1991 to minors (A1394; A934-39; *see* A748-50; A898-1051). The record before the Council included substantial evidence that the percentage of young people below age 18 who smoke is increasing, particularly in the minority community, both nationwide and in the City (A1394, A997-1017).

At several hearings held by the Council's Committees on Youth Services and Health, numerous people testified, including students, teachers, parents, public officials, representatives of anti-tobacco and health organizations, doctors, advertisers, store owners, and legal scholars (A753-54; A1412-2395). There was also ample testimony and reports from experts, newspaper and

scientific journal articles, and other written submissions, which provided compelling data that advertising of tobacco products has played a significant role in teenage tobacco use and smoking patterns and that there is a pervasive presence of tobacco advertising, obviously targeting youth, in the community (*id.*)

The Council's Declaration points to recent revelations from tobacco product manufacturers, including a Liggett & Myers statement that "Liggett acknowledges that the tobacco industry markets to 'youth,' which means those under 18 years of age...." (A1395). It also cites the 1996 Food and Drug Administration ("FDA") rules on advertising and promotion of tobacco, which observed that "the images typically associated with advertising and promotion convey the message that tobacco use is a desirable, socially approved, safe and healthful, and widely practiced behavior among young adults, whom children and youths want to emulate" (A1395, A751, A1018-47). The Council notes that the FDA stated that its rules "do not . . . reflect a judgment that more stringent State or local requirements are inappropriate" (A1395).[2]

In view of all the evidence "that cigarettes are advertised and promoted to minors and that smoking by minors continues to dramatically increase despite laws banning the sale or distribution of tobacco products to minors," the Council finds that "affirmative, reasonable and constitutionally permissible restrictions on tobacco product advertising and promotion may and must be enacted" (A1395-96). The Council noted that Baltimore's similar

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[2] The specific administrative authority of the FDA to act and issue such rules has been rejected. *Brown & Williamson Tobacco Corp. v. Food and Drug Administration*, 153 F.3d 155 (4th Cir. 1998), *cert. granted*, 119 S.Ct. 1495 (1999) (argued Dec. 1, 1999).

ordinance was upheld by the Fourth Circuit in *Penn Advertising, Inc. of Baltimore v. Mayor*, 63 F.3d 1318 (4th Cir. 1995), *vac. and remanded*, 518 U.S. 1030 (1996), *aff'd*, 101 F.3d 322 (4th Cir. 1996), *cert. denied*, 520 U.S. 1204 (1997) ("*Penn Advertising*") (A1395-96). Elaborating, the Council states (A1395-96):

> The purpose of this legislation is to promote enforcement of the aforementioned laws banning the sale or distribution of tobacco products to minors and to thereby protect young people. The Council is cognizant of the necessity of acting within the protections afforded by the First Amendment to the United States Constitution and has, therefore, narrowly tailored the scope and effect of this legislation to impose reasonable time, place and manner restrictions on tobacco advertising aimed at or regularly seen by youth while not directly affecting advertising and promotions directed at adults.

The Declaration concludes that, *inter alia*, the legislation "targets minors who may not legally purchase cigarettes," not adults, and does not completely ban outdoor advertising but rather "restricts the time, place and manner of such advertisements" (A1397).

The Litigation.

On January 14, 1998, petitioners, an association of independent supermarkets and national and local associations of advertisers, filed an amended complaint challenging Article 17-A, the tobacco product advertisement restrictions, alleging that the restrictions on outdoor and publicly-visible advertising violate the First Amendment and the parallel provision in Article I, § 8 of

the New York Constitution (A9-29).[3] The complaint's third count alleges that such restrictions are preempted under the FCLAA, and therefore violate the Supremacy Clause (A27). Petitioners sought declaratory and permanent injunctive relief, as well as attorneys' fees (A28-29).

Petitioners moved for summary judgment and a permanent injunction, arguing that the Youth Protection Act violated their First Amendment rights and that it was preempted by the FCLAA (A40-43). Respondents cross-moved for summary judgment declaring the Act valid (A592-95).

The evidence showed that approximately 80% of the City is available for tobacco product advertising under the Youth Protection Act (A762, A1146-47, A2398-99). However, in some of those areas, there are general zoning restrictions which restrict all outdoor product advertising (A1146-49, A2399), not just tobacco advertising as petitioners imply (Pet. p.3, first full par., last line).

CONSTITUTIONAL AND STATUTORY PROVISIONS

In addition to the constitutional and statutory provisions listed by petitioners, section 1331 of the FCLAA provides as follows:

> It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with

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[3] Petitioners did not challenge the tobacco product promotion provisions of the Act.

> respect to any relationship between smoking and health, whereby—
>
> (1) the public may be adequately informed about any adverse health effects of cigarette smoking by inclusion of warning notices on each package of cigarettes and in each advertisement of cigarettes; and
>
> (2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

15 U.S.C. § 1331.

THE DISTRICT COURT OPINION

By decision and order dated December 15, 1998, the District Court granted petitioners' motion for summary judgment and entered a permanent injunction against respondents from enforcing the Youth Protection Act; it thus denied respondents' cross-motion (21a-40a). The Court primarily relied on the Second Circuit's holding in *Vango Media v. City of New York*, 34 F.3d 68 (2d Cir. 1994) ("*Vango Media*"), which dealt with a very different statute requiring placement of certain anti-tobacco advertisements, and disavowed the *Penn Advertising* holding, insofar as the Fourth Circuit found that the FCLAA preemption provision concerned requirements or prohibitions which affect the "content," but not the "location," of tobacco product advertising (32a-34a).

THE COURT OF APPEALS OPINION

By opinion entered October 25, 1999, after reviewing this Court's precedent on the governing preemption principles (7a-8a), the Court of Appeals found that, with the exception of the "tombstone" provision, the FCLAA did not preempt the Youth Protection Act (1a-20a). The Court thus: 1) affirmed the judgment insofar as the District Court held that the "tombstone" provision was preempted by the FCLAA,[4] 2) reversed insofar as the District Court held that the remaining provisions of Article 17-A were preempted, and 3) remanded for further proceedings in the District Court with respect to the First Amendment claim (20a).

With respect to the preemptive scope of the FCLAA, the Court noted that:

> "[r]ead literally, [the preemptive scope of §1334(b)] ... could be misunderstood to preempt every conceivable obligation having a relationship – however evanescent – to the advertising and promotion of cigarettes. But this hyper-literal approach

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[4] The "tombstone" provision had permitted, even in the restricted areas, a single, black-and-white, text-only sign which stated "TOBACCO PRODUCTS SOLD HERE," to be placed within ten feet of an entrance to a store where tobacco products are sold (45a). The Circuit Court found that that provision created an obligation directly pertaining to the nature and content of advertising information which risked the sort of "diverse, nonuniform, and confusing" advertising standards that Congress expressly sought to avoid in 15 U.S.C. § 1331 (12a-15a). Applying New York law, the Court found that the "tombstone" provision was severable from the rest of Article 17-A, which was valid and enforceable (18a-19a).

> would yield results that Congress surely did not intend. To take an absurd example, it could divest states and municipalities of authority to prevent tobacco advertisers from posting their ads in public buildings even though smoking is legally prohibited there.

(8a).

Recognizing that this Court has "recently cautioned" against "uncritical literalism" when interpreting similarly open-ended language in the express preemption provision of another federal statute, citing *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645, 656 (1995), the Second Circuit looked to the language of the preemption provision, its historical context, legislative history and purpose, consonant with its earlier precedent in *Vango Media* (9a-10a). Looking to the two express purposes set forth by Congress with respect to the intended preemptive scope of the FCLAA, set forth in 15 U.S.C. §1331, the Court distinguished the *Vango Media* ordinance, as requiring advertisers to display certain messages about smoking and health (other than those required by the FCLAA), and thus risking creating nonuniformity with Congress's federally mandated warning scheme, in violate of §1331's intent to avoid "diverse, nonuniform, and confusing" advertising standards (11a-12a).

In contrast, citing *Penn Advertising, supra,* and *Federation of Advertising Industry Representatives, Inc. v. City of Chicago*, 189 F.3d 633 (7th Cir. 1999), *pet. for cert. filed,* 68 U.S.L.W. 3480 (Jan. 12, 2000) (No. 99-1172), the Court of Appeals held that the physical placement or location restrictions do not impose obligations "with respect to" advertising as that phrase is used in §1334(b) (15a-18a). The Court emphasized that such restrictions do

not touch upon Congress's "comprehensive Federal program" to control cigarette advertising information (16a). It also found that the restrictions do not burden advertisers with a duty to warn nor impose content and format requirements on advertising information, but, instead, regulate placement of signs in a "manner akin to a run of the mill zoning regulation" (16a).

Furthermore, the advertisers did not show how location restrictions could lead to the sort of "diverse, nonuniform, and confusing" standards that Congress sought to avoid when it enacted §1334(b) (16a-17a). Rather, as the Court stated:

> Divergent local zoning restrictions on the location of sign advertising are a commonplace feature of the national landscape and cigarette advertisers have always been bound to observe them. Thus, with or without Article 17-A, a cigarette advertiser will still have to ascertain where it can permissibly advertise in light of diverse local zoning ordinances. And no party suggests that such *zoning* regulations fall within the intended purview of § 1334(b). We see no reason to treat the location restrictions before us any differently.

(17a, italics in original).

The Circuit Court also noted that the presumption against preemption is particularly strong in the instant case, as the challenged provisions both as to placement of outdoor advertising and as to regulations directed to the safety and welfare of children lay "within the heartland of the states' historic police powers" (17a-18a, citations omitted).

The Court declined to rule on the merits of the First Amendment claim, opining that the District Court should have the opportunity to consider the issue in the first instance (19a). Upon such remand, there are currently pending the parties' motion and cross-motion for summary judgment with respect to the claimed First Amendment violation.

REASONS FOR DENYING THE PETITION

CERTIORARI SHOULD BE SHOULD BE DENIED BECAUSE PETITIONERS FAIL TO MEET THE STANDARDS FOR REVIEW BY THIS COURT.

The issue the petition presents does not warrant review by this Court, and certainly not at this time. Accordingly, the petition should be denied.

(1)

With respect to the claimed split among the Circuit Courts (Pet. Pt. I, pp. 8-13), there is ample agreement among three of the four Circuits which have addressed the issue to date, the Second, Fourth and Seventh, that local laws such as the City's are not preempted under the FCLAA. *See, The Greater New York Metropolitan Food Council, Inc. v. Giuliani*, 195 F.3d 100 (2d Cir. 1999), *pet. for cert. filed*, 68 U.S.L.W. 3480 (Jan. 12, 2000) (No. 99-1171) (1a-20a); *Federation of Advertising Industry Representatives, Inc. v. City of Chicago*, 189 F.3d 633 (7th Cir. 1999), *pet. for cert. filed* (Jan. 12, 2000) (No. 99-1172); *Penn Advertising, supra.*[5]

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[5] In two recent decisions, the District Court of Massachusetts ruled that the State of Massachusetts' law in this area was not preempted by the FCLAA, *Lorillard Tobacco Co. v. Reilly*, 76 F.Supp.2d 124 (D. Mass. 1999), and that it did not violate the

In any event, the present application is premature because the single claimed conflict with the Ninth Circuit is not yet resolved given that that Court is considering rehearing the case *en banc*. *Lindsey v. Tacoma-Pierce County Health Dep't*, 195 F.3d 1065 (9th Cir. 1999), *amended*, 2000 U.S. App. LEXIS 1967 (9th Cir. Feb. 14, 2000) (*see* Pet. p. 9, n.3; *see also* discussion in City of Chicago's Brief in Opposition to Petition for a Writ of Certiorari in the *Federation* case).[6]

(2)

In addition, the application should be denied because there is no final judgment in the instant case, which has yet to be resolved with respect to the claimed First Amendment violation. The interlocutory nature of the application warrants denial of the application in order to avoid any potential piecemeal review.

(3)

Finally, notwithstanding petitioners' claims (Pet. Pt. II, pp. 13-17), the application should be denied because the Circuit Court's decision was correct and does not conflict with this Court's plurality decision in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992). As set forth above, the Second Circuit's opinion carefully examined the guiding principles in *Cipollone*, as well as this Court's more recent

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First Amendment. *Lorillard Tobacco Co. v. Reilly*, 2000 U.S. Dist. LEXIS 862 (D. Mass. Jan. 24, 2000), *notices of appeal filed* (Feb. 2000). Upon information obtained from the Massachusetts Attorney General's Office, the appeals are scheduled for argument in the First Circuit on April 7, 2000.

[6] On February 14, 2000, the Ninth Circuit's opinion was amended to add a concurring opinion by Judge O'Scannlain. 2000 U.S. App. LEXIS 1967 (9th Cir. Feb. 14, 2000).

precedent in *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) and *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645 (1995). *See also United States v. Locke*, 2000 U.S. LEXIS 1895 (U.S. March 6, 2000) (reiterating that an "assumption" of nonpre-emption is not triggered when the State regulates in an area where there has been a history of significant federal presence, and contrasting that situation to cases involving subjects historically regulated by the States).

In this case, the Second Circuit properly applied the long-standing presumption against preemption of historic state and local police powers. Specifically, the Circuit correctly recognized that both the local zoning regulatory powers as to placement of outdoor advertising and as to regulations directed to the safety and welfare of children lay "within the heartland of the states' historic police powers" (17a).

Finally, petitioners' stated conflict fails to recognize that, in *Cipollone*, this Court cited with approval the accompanying Senate Report to the FCLAA. *Id.*, 505 U.S. at 529, n.26. As the Second Circuit pointed out, the legislative history of §1334(b) "suggests that Congress wanted to give ... [police power] regulations a wide berth," given that the Senate Report notes that §1334(b) is "narrowly phrased" and "would in no way affect [local power] with respect to the taxation or the sale of cigarettes to minors, or the prohibition of smoking in public buildings, or *similar police regulations*" (18a, citing, S. Rep. No. 91-566, *reprinted in* 1970 U.S.C.C.A.N. 2652, at 2663 (emphasis added by Court)).

Accordingly, based on all of the above, we respectfully urge this Court to deny the petition for a writ of certiorari.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

MICHAEL D. HESS
Corporation Counsel of the
City of New York
Attorney for Respondents
100 Church Street
New York, New York 10007

LEONARD J. KOERNER*
ELIZABETH SUSAN NATRELLA
of Counsel

*Counsel of Record